Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSEPH DISMAS MURPHY,

Petitioner,

v.

THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Franklin County Ohio, Tenth Ohio Appellate Court District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Fifth Amendment requirement of due process of law and the Fourteenth Amendment guarantee of equal protection of the law preclude a civil negligence trial from taking place, for reasons of administrative convenience, in a State prison where petitioner-plaintiff is an inmate under sentence of death, when the defendant is the prison, when the trial is not *de facto* open to the public, when a retired judge is the fact finder sitting by temporary assignment, and when said venue was authorized by the Ohio Chief Justice, pursuant to Ohio Revised Code Section 2743.03(B).

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PETITION FOR WRIT OF CERTIORARI

Joseph Dismas Murphy respectfully requests that the Honorable Justices of the Supreme Court of the United States grant a writ of certiorari to review the judgment of the Court of Appeals of Franklin County, Tenth Ohio Appellate Court District.

OPINIONS BELOW

The opinion of the Court of Appeals of Franklin County, Ohio is printed as Appendix **A** to this petition. The judgment entry of the Court of Appeals is printed as Appendix **B** to this petition. The opinion of the Ohio Court of Claims is printed as Appendix **C** to this petition.

The decision of the Ohio Supreme Court dismissing the discretionary appeal is printed as Appendix **D** to this petition. The decision of said court refusing reconsideration is printed as Appendix **E** to this petition.

JURISDICTION

The Court of Appeals of Franklin County, Ohio, rendered its decision affirming the Court of Claims on October 8, 2002. However, its judgment entry was filed on October 13, 2002. The decision of the Ohio Supreme Court, dismissing the discretionary appeal as not involving a substantial constitutional question was rendered on March 12, 2003. The final judgment of said Supreme Court, refusing reconsideration of its dismissal, was rendered on May 7, 2003. The jurisdiction of this Court is

invoked under 28 U.S.C. Sect. 1257, following the considerations and parameters set forth in U.S. Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in the case provide, in pertinent part:

No person shall ... be deprived of ... property without due process of law.

U.S. Constitution, Amendment V.

... No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV

STATEMENT OF THE PROCEEDINGS

On January 23 and 24, 2001, the Ohio Court of Claims conducted a bench trial at an area within Mansfield Correctional Institution. The main thrust of the lawsuit was the negligence of prison employees in not complying with prison post orders, with the result that a riot occurred in a structure known as Death Row Four on September 5, 1997. Additionally, prison employees were negligent in not moving petitioner (hereinafter "Murphy") to a place of safety after he gave many warnings, orally and in writing [by prison "kites"] that the rioters intended to kill him, in revenge for warning of the riot. Respondent admits that the riot resulted in severe bodily injury to

Murphy. Trial transcript page 51, lines 1-9 [hereinafter "51(1-9)"].

Respondent's main tactic throughout the trial was to impugn Murphy's credibility, since he had been sentenced to death for murder. Partly for this reason, Murphy moved the court to enlarge the record with his discovery deposition taken by respondent, as ordered *sua sponte* by the court. The court overruled said motion without comment and rendered judgment in favor of the respondent as to liability. The court essentially adopted respondent's requests for findings of facts, one of which was that Murphy committed perjury with respect to the prison kites.

STATEMENT OF FACTS

Murphy was moved to a cell in Death Row Four as a result of a conviction by the prison's Rules Infraction Board, which conviction was later set aside by respondent's director. Alone in his cell on July 11, 1997 he overheard the conversation of certain inmates who had killed ten people in the 1993 Lucasville, Ohio prison riot. At trial he testified:

> "And it was around 3:30 a.m. and 5:00 a.m. that the inmates was discussing it for about an hour of overpowering officers, starting a riot, killing as many people as possible to prove a point that if you treat them like animals, they will act like animals" 119(2-7).

Deputy warden Richard Hall was aware that these inmates were very dangerous people:

> " . . . We had – you would have expected that the Lucasville five inmates would, if given the

> opportunity, you know, to take a hostage, you know, riot, take over, because they were exactly back there because they had done that before . . ." 399(22) to 400(5).

On July 14th Murphy told officer Betty Traxler what he overheard. Now, with foreknowledge of a possible riot, the authorities added two lieutenants to the staff of Death Row Four who closely supervised the work of the correction officers (hereinafter "CO's"). The lieutenants were withdrawn a few days later, the riot not having occurred in the interim. Back inside Death Row Four the Lucasville thugs specifically voiced their intention still to riot and, further, to kill Murphy for temporarily foiling their plans. The warden and others in authority were specifically informed of these intentions by Murphy orally and in writing [the kites], and he pleaded with them to be removed from danger. However, the warden and others did not opt to protect him, and when the riot did occur, Murphy was beaten into unconsciousness by the rioters. He would have died by hanging, but for the bravery of inmate William Garner, who dragged him to a cell, even as Garner himself was being assailed by them 72(20)-73(15), 162(1-2).

D. Vincent Trago, M.D. testified that Murphy's post-traumatic stress disorder was *not* solely attributable to the injuries he received in the riot:

> "No. I – it seemed to me that this revolved around his fear of retribution and what he felt was a lack of protection and removal from other inmates that might want to do him harm still in the future . . . In addition to the injuries that he received, that there was an ongoing fear in addition to the episode about the riot" 532(5)-533(4).

Since the riot did not occur in the time frame envisioned by prison officials, Murphy was labeled a troublemaker and was treated as such. After the riot *did* occur, the officials have highlighted his status (and still do today) as a convicted murder unworthy of belief, in a continuing effort to de-emphasize their own negligence in permitting the riot to have occurred.

REASONS FOR GRANTING THE WRIT

I. PRISONS ARE FIRMLY IN THE CONTROL OF THE STATE AND A DEATH ROW NEGLIGENCE PLAINTIFF UNIQUELY REQUIRES THE PROTECTION AFFORDED IN A TRIAL HELD IN A REGULAR COURTROOM OPEN TO THE PUBLIC

On numerous occasions the Supreme Court has recognized the existence of a constitutional right of access to the courts. In *Younger v. Gilmore*, 404 U.S. 15 (1971), this court held that prisoners are also entitled to access to courts. On other occasions, the Court has identified the source of the right of access in the prisoner context as the Due Process clause. *Ex Parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (**1941**); *Johnson v. Avery*, 393 U.S. 483, 490, 89 S.Ct. 747, 751, 21 L.Ed.2d 718 (**1969**); *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (**1974**); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (**1977**). The right of access is also rooted in the Equal Protection Clause: *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 2771 n.6, 106 L.Ed.2d 1 (**1989**), and in the First Amendment, *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S.Ct. 3184, 82 L.Ed.2d 393 (**1984**).

In *John L. v. Adams*, 969 F.2d 228 (1992), the Sixth Circuit held that in any cause of action to remedy a wrong, States may not erect *barriers* that impede incarcerated persons' right of access to courts. *Lewis v. Casey*, 518 U.S. 343 (1996), affirmed this principle of access, but there has not been any guidance on the proper environment, when an inmate actually appears for trial. In his dissent Justice Stevens pointed out one such barrier: "Prisons are uniquely subject to the control of the State." Id. at 409. This control is aptly exemplified in *Thomas v. Mills*, 117 O.S. 114 (1927), where a warden refused to allow a lawyer to see his inmate client.

The following are Ohio cases where trials were held away from the court house: In *Kirkland v. Archbold*, 68 Ohio Law Abs. 481, 486 (1953) the judge conducted a civil trial at a construction site. Even though the parties did not object to the site, the Cuyahoga County Court of Appeals ordered a new trial and ruled that a trial must be conducted in the gravity of a regularly constituted court-room. In *State v. Lane*, 60 Ohio St.2d 112 (1979), a jury found a prisoner guilty of the crime of "escape." Since the trial was conducted in the very prison where he was incarcerated, the Supreme Court reversed, holding that no jury could be impartial in such a setting.

If any situation commands a neutral site duly to secure one's rights, surely it is that of a prisoner sentenced to death for murder. In the case at bar plaintiff Murphy appeared at trial in hand shackles and leg irons, although the hand shackles were removed when he took the stand. There were two CO's right behind him and other CO's in the audience. The effectiveness of the testimony of the primary witness to respondent's negligent act, William

Garner, was decreased, as he took the stand, handcuffed and with leg irons.

II. ALTHOUGH IT IS PRESUMED THAT A RETIRED JUDGE WOULD NOT BE OVERBURDENED BY THE ENVIRONMENT OF A PRISON, THIS PRESUMPTION WAS REBUTTED BECAUSE: (1) PLAINTIFF'S MURDER CONVICTION WEIGHED TOO HEAVILY ON HIS MIND AND (2) CERTAIN CRUCIAL FINDINGS WERE IN NO MANNER SUPPORTED BY THE EVIDENCE

In other respects this case mirrors *In Re Murchison*, 349 U.S. 133 (1955), where a Michigan judge, acting as a one-man grand jury, attributed special credibility to witnesses who had testified contrary to the testimony of two law enforcement officers. The fact that Murphy informed CO Traxler of the impending riot was accepted by the judge because Traxler verified it. As the Court of Appeals wrote in its opinion: "the trial court concluded that the testimony of the prison officials with whom he [Murphy] had spoken and addressed correspondence was more credible."

At the very end of the last session of trial the judge mused as follows:

> . . . . I know that when it came up for – before the Supreme Court, I – you know, I know that you did tell Mrs. Traxler about the conversation you overheard, and I believe that, *and I think it is verified*. . . . The other thing – and I would do that for the plaintiff. I'm not saying it would help him, but because of the fact that he did notify the

> officials and because of the fact that it's a 4-3 decision, and I have a lot of respect for all of the justices of the Supreme Court, if it would be of any help to him, you could tell the public defender that this judge would be willing to write a letter for clemency, because I do think that he did take some risk in writing a letter. I don't – like I said, I don't believe all of the things that he's saying – there's a lot of it I don't – but there's no question he did do that, and that the legal significance, you know, if it would help him– and I'm not saying it would – with the governor some way, I think that that's something they ought to know about. Whether or not they think what Judge Shoemaker thinks is of any value, I'm not saying that. I don't mean to imply that, but if your public defender wanted to contact me – now that doesn't mean I'm going to bring in a verdict for the plaintiff in this case. Pages 537-539 (Emphasis added)

Earlier, listening to Murphy's testimony, the court remarked: "I know that the worst thing that can happen to anyone in an institution is to be considered a snitch. And I don't have any problem believing for one minute that Mr. Murphy was bonafidely [sic] worried about his safety" 150(2-5). Yet, although the judge knew that Murphy was bonafidely worried about his safety because he "snitched" to Traxler, in his finding of fact #28 and in his conclusion of law #6, he ruled that prison officials like Traxler had no notice whatsoever of an impending retaliatory attack upon Murphy by the Lucasville thugs.

Ohio evidentiary statute R.C. 2921.11(E) blocks a trier of fact from concluding perjury, based on the contradictory testimony of one (1) witness, unless there is some independent corroborating evidence. Although mandatory for

prosecutions for perjury, this rule of evidence is logically applicable to all causes of action involving contradictory testimony of one lone witness, most especially in an environment where the negligence plaintiff is in the custody and control of the defendant. In this case the lone witness contradicting Murphy's kites notification of personal danger to himself was State employee, Priscilla Rowe. There was no truly reliable and probative evidence corroborating her, as Murphy tried to point out to the courts below. On Rowe's testimony alone, the judge found that Murphy was a "perjurer" with respect to the kites [Finding #13].

Exhibit 9 was a kite to warden Coyle warning of Murphy's personal peril, which kite was date-stamped as "received" by the warden's office one (1) week before the riot. 142(7)-143(4), 342(15)-343(6). Respondent did not offer its reproduction of this kite, and state employee Rowe could not offer any positive testimony that this kite was altered 350(6), but only "hit-or-miss" innuendo. Exhibit 9 recited in pertinent part:

> **". . . I'll die if you keep me here. Talk to me, please. I need help bad. Get me out of here please. . . . "** 142(5)-143(40)

Yet, the court credited the innuendo and specifically held that Murphy was a perjurer with respect to Exhibit 9.

In Finding of Fact #18 the judge found, inter alia, that "inmate Keith Lamar overpowered a CO in a recreation area." Yet at the conclusion of the trial he remarked: "I think . . . that Hayes was negligent when he didn't follow the rules; that the negligence was a proximate cause of injury." 538(6-9). If Keith Lamar "overpowered Hayes", it was only because CO Hayes allowed him to do so, by not

shackling him, as required by the post orders of the prison. As explained by deputy warden Richard Hall:

> Lamar got free because evidently – I wasn't there – but evidently the ec cage door was opened without him being strained. 455 (13-16).... The captain in this case evidently recommended that Mr. Hayes be removed. And evidently, warden Coyle approved that and in fact, did remove him 444(18-23).

In finding of fact #12, the trial court concluded that between the end of July 1997 through September 5, 1997, prison officials did not receive any additional or new information that a riot was planned. Nonetheless, Kathy Isgro, a medical official of the prison, 253(9-11) interviewed Murphy in Death Row Four about seven to ten days before the riot. 258 (21-24). She testified:

> Mr. Murphy told me that he was overhearing other inmates in their cells at night planning the riot, the takeover of the unit. And he told me he was fearful for his safety 259 (15-19).

Murphy's murder conviction verdict was returned in 1987, over ten years before the January 2001 trial in the case at bar. Hence, pursuant to Ohio Evidence Rule 609(B), that conviction alone was no basis for disbelieving Murphy's testimony. The court was mandated to put that conviction out of mind, when assessing his credibility. ***But for*** the unwarranted attention that was paid to that conviction, the evidence in this negligence case plainly favored Murphy.

CONCLUSION

In the sphere of constitutional protections, the Supreme Court has not yet treated about the proper venue and circumstances of a trial where a condemned prisoner has been permitted to give live testimony in his case for damages. In his particular circumstances petitioner Murphy should have been afforded a trial in a proper court room, open to the public, with no indicia of prison life about, and with rigorous attention being paid to the rules of evidence with respect to the credibility of witnesses. He has posed a federal question, the factual background of which lends itself easily to a precedential decision by this court, and a question which ought to be decided.

Joseph Dismas Murphy respectfully requests that this Honorable Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph D. Murphy, Plaintiff-Appellant, v. Department of Rehabilitation and Correction, Defendant-Appellee.	:	No. 02AP-132 (REGULAR CALENDAR) (Filed Sep. 30, 2002)

OPINION

Rendered on September 30, 2002

John F. Heath, for appellant.

Betty D. Montgomery, Attorney General, *Matthew J. Lampke* and *William C. Becker*, for appellee.

APPEAL from the Ohio Court of Claims.

GLASSER, J.

{¶1} This matter is before this court upon the appeal of Joseph D. Murphy, appellant, from the decision and judgment entry of the Ohio Court of Claims, which ruled in favor of appellee, the Ohio Department of Rehabilitation and Correction ("ODRC") on the issue of liability. Appellant had filed a lawsuit against ODRC alleging that ODRC was negligent in allowing the September 5, 1997 riot in death row pod No. 4 ("DR-4") to take place and that he received inadequate medical

treatment from the staff at the Mansfield Correctional Institution ("ManCI") following the riot.

{¶2} Appellant sets forth the following assignments of error on appeal:

{¶3} "[1.] The court rendered a decision in favor of defendant concerning its liability that was against the manifest weight of the evidence.

{¶4} "[2.] The Court's conclusions of law were incorrect to the extent that they were intermingled with erroneous findings of fact, as hereinafter set forth.

{¶5} "[3.] The court erred in sustaining objections to certain questions asked by Plaintiff's counsel of Priscilla Rowe, which questions were directly relevant to Rowe's credibility, and which were proper on cross-examination.

{¶6} "[4.] The court erred in sustaining objections to certain questions asked by Plaintiff's counsel of inmate Garner, which questions were directly relevant to defendant's habitual negligence in September 1997 and before.

{¶7} "[5] The court erred in finding that Murphy failed to prove by the preponderance of the evidence that he received inadequate medical treatment after the riot; but the error was only as to follow-up treatment, not the urgent care.

{¶8} "[6] The court erred in failing to grant the enlargement of the record with the deposition of Plaintiff Joseph Murphy that was taken on 9/28/2000 by the Defendant *as on cross-examination*, because 1) both doctors, in part, relied on said deposition for their medical testimony, and 2) the court therein had an opportunity

further to assess the veracity of Murphy, before reaching his 'absolutely clear' conclusion of perjury with respect to Murphy's testimony regarding the kites."

{¶9} Appellant was a death row inmate at ManCI and was confined to the B-side of DR-4 which was the disciplinary segregation unit for death row prisoners. On July 11, 1997, appellant overheard certain death row inmates discussing a takeover of DR-4. On July 14, 1997, appellant informed Officer Traxler that he had overheard inmates discussing a takeover. Based upon appellant's information, two additional lieutenants were assigned to DR-4 during the first and second shifts. Those extra lieutenants were pulled out of DR-4 at the end of July 1997 because prison officials did not receive additional or new information concerning a takeover. On September 5, 1997, a riot occurred in DR-4 after inmate Keith Lamar overpowered a correctional officer in a recreation area and used the officer's keys to release inmate Tony Powell from another recreational cage. Together, inmates Lamar and Powell assaulted the officers on duty and obtained their keys, which they used to release other inmates. The riot itself was confined within DR-4 The inmates painted the windows with primer and placed sheets over shattered glass so that the view of DR-4 was blocked. Several inmates, including appellant, were assaulted. Eventually members of the Special Response Team ("SRT") were able to secure the area. Each inmate was handcuffed pursuant to security policies and escorted to a nearby triage area for medical assessment. Appellant received medical attention for his injuries, which included a fractured jaw.

{¶10} On March 18, 2002 [sic], appellant field [sic] a complaint in the Ohio Court of Claims alleging that ODRC was negligent in failing to remove him from DR-4 or

otherwise protect him after he gave information concerning the riot, that the officers of the SRT used excessive force when they re-took control of DR-4 and added to appellant's injuries, and that appellant received inadequate medical attention for his injuries following the riot. The court concluded that appellant had not met his burden of proof and that ODRC was not negligent in failing to remove him from DR-4 or otherwise protecting him, that the officers of SRT did not use excessive force in securing DR-4, and that appellant did not demonstrate that he had received negligent medical treatment for his injuries following the riot.

{¶11} In this appeal, appellant assigns six assignments of error; however, the main thrust of his appeal is that the Court of Claims rendered a decision which was against the manifest weight of the evidence. In his first, second and fifth assignments of error, appellant challenges numerous findings of fact made by the trial court. The remaining assignments of error concern the trial court having sustained objections to questions asked of Priscilla Rowe and inmate Garner as well as the trial court's decision refusing to allow appellant to file his deposition taken on September 28, 2000, following the trial. For the reasons that follow, this court overrules appellant's assignments of error and affirms the judgment of the Ohio Court of Claims.

{¶12} In order to have succeeded in his negligence action against the state, appellant had to prove by a preponderance of the evidence that ODRC owed him a duty, that it breached that duty, and that the breach proximately caused appellant's injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282. In the context of the custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and

protection from unreasonable risks. See *McCoy v. Engle* (1987), 42 Ohio App.3d 204 and *Woods v. Ohio Dept of Rehab. & Corr.* (1998), 130 Ohio App.3d 742. This court noted further in *Woods*, as follows:

{¶13} "A determination of what degree of care [the state] owed to [appellant] must center on the foreseeability of [appellant's] injuries. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140. The extent of the duty will also vary with the circumstances. *Clemets v. Heston* (1985), 20 Ohio App.3d 132. However, the state is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk. *McAfee v. Overberg* (1977), 51 Ohio Misc. 86. Reasonable or ordinary care is that degree of caution and foresight that an ordinarily prudent person would employ in similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St.2d 310. Furthermore, the special relationship evident between jailer and inmate does not expand or heighten the duty of ordinary reasonable care. *Scebbi v. Ohio Dept. of Rehab & Corr.* (Mar. 21, 1989), Ct. of Claims. No. 87-09439, unreported."

{¶14} Judgments supported by some competent, credible evidence go into all of the essential elements of the case and will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. Questions of fact are best left to the trier of fact. *Complete Gen. Constr. Co. v. Ohio Dept. of Transp.* (2002), 94 Ohio St.3d 54. It has long been held that factfinder's are generally charged with drawing reasonable inferences from established facts, and that they view the witnesses and observe their demeanor, gestures and voice inflections, and use these observances in weighing the credibility of the proffered testimony. *Mid-America Tire, Inc. v. PTZ*

Trading Ltd., (2002), 95 Ohio St.3d 367, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77. If the evidence is susceptible to more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment most favorable to sustain the verdict and judgment. *Seasons Co.*, supra.

{¶15} When applying this standard to the present case, it is clear that the trial court's verdict was not against the manifest weight of the evidence.

{¶16} In his first, second and fifth assignments of error, appellant challenges the following findings of fact made by the trial court and argues that those findings are against the manifest weight of the evidence: fourth, eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, twenty-seventh, and twenty-eighth. This court will begin with appellant's challenge to the thirteenth finding of fact, as it was here that the trial court determined that appellant gave perjured testimony. Appellant has continued to maintain that he informed officials at ODRC that a riot was imminent and that appellant made numerous requests to be removed from DR-4 prior to the riot because appellant feared for his life. The trial court did determine that appellant had notified prison officials of a possible riot on July 14, 1997. At that time, ManCI assigned two additional lieutenants to DR-4. Those lieutenants were removed at the end of July 1997 because no new or additional information of a riot was received.

{¶17} Between August 1997 and September 5, 1997, appellant submitted several kites (inmate communications) to various prison officials. Once a kite is submitted, a copy

is made of the kite which is kept in the inmate's file. The kite is then returned to the inmate along with a response. In finding of fact thirteen, the trial court concluded that appellant had altered the kites that he had received back from the officials to whom he had sent them to include language concerning a riot and concerning his fear for his safety. By comparing the copies of the kites which were kept by the officials with the copies of the kites submitted by appellant, the trial court concluded that appellant had altered those exhibits. Upon review of those documents, this court finds that finding of fact number thirteen is supported by the record and is not against the manifest weight of the evidence. The trial court's determination that appellant had altered these kites influenced several of the other findings of fact made by the trial court and forms the basis of appellant's challenges to the trial court's decision.

{¶18} With regard to finding of fact number four, the trial court found that appellant had stated his displeasure with the Rules Infraction Board ("RIB") convictions he had received. Appellant challenges this finding as being against the manifest weight of the evidence and submits the copies of the kites, which he submitted into evidence. Inasmuch as this court finds that the trial court's determination that those kites had been altered was supported by the record and is not against the manifest weight of the evidence, the trial court's decision with regard to finding of fact number four is not against the manifest weight of the evidence.

{¶19} In finding of fact number eight, the trial court concluded that when appellant informed Officer Traxler that he had overheard conversations regarding a takeover in July 1997, appellant had not asked to be removed from

DR-4. A review of the kites, which were in the possession of the various officials at ManCI, reveals that appellant was indeed seeking review of his RIB convictions. It is only in appellant's kites, which the court determined were altered, and in his testimony that appellant presents any evidence that he actually asked to be removed from DR-4. Based upon the kites themselves, which were in the possession of prison officials, the trial court made its conclusion and this court cannot say that finding is against the manifest weight of the evidence.

{¶20} The eleventh finding of fact involves the reasons why the additional lieutenants which had been assigned to DR-4 were removed. The trial court concluded that they were removed because there was no reason to believe there was going to be a riot. Appellant contends that they were removed because they deemed him to be a "troublemaker." Richard Hall, Deputy Warden of Operations, testified that the lieutenants were removed because no further information concerning a possible riot or takeover was received. This finding is supported by the evidence, and is not against the manifest weight of the evidence.

{¶21} In the twelfth finding of fact, the trial court concluded that between the end of July 1997 through September 5, 1997, prison officials at ManCI did not receive any additional or new information from appellant that a riot was being planned. Appellant again points to his kites, which the trial court concluded had been altered after they had been returned to him from prison officials. Further, Inspector Priscilla Rowe, to whom appellant addressed several of his kites, and Mr. Hall both denied receiving any additional information from appellant or anyone else after July 1997 when appellant first informed

prison officials that he had heard rumors of a riot. Obviously the trial court found their testimony to be credible and this finding is not against the manifest weight of the evidence.

{¶22} In the fourteenth finding of fact, the trial court concluded that Investigator Joseph Masi did not receive any information from Shirley Pope, the principle research assistant for the correctional institution's inspection committee, prior to the riot. Appellant directs the court's attention to his Exhibit 13 as evidence that Ms. Pope told appellant that she had conveyed to Mr. Masi the information from appellant concerning the riot. However, upon review of that exhibit, this court specifically notes the letter addresses appellant's ongoing RIB conviction for assaulting a prison officer. Nothing in that letter discusses a riot. As such, this finding is likewise not against the manifest weight of the evidence.

{¶23} In the fifteenth finding of fact, the trial court concluded that prison officials at ManCI were not aware that inmates Lamar and Powell planned to takeover DR-4 or that appellant was in any personal danger. As stated previously, the trial court specifically found that the kites which appellant admitted into evidence had been altered and there was evidence from other scurces that appellant had not conveyed additional information to prison staff after July 1997. This finding is not against the manifest weight of the evidence.

{¶24} The sixteenth finding of fact concerns Inspector Rowe's September 3, 1997 discussion with appellant. Ms. Rowe testified that appellant appeared relaxed, pleasant, calm and not in fear for his life. Ms. Rowe specifically testified that the topic of their

conversation involved appellant's RIB conviction for assaulting an officer and that appellant never mentioned there was going to be a takeover or a riot nor did he indicate that he was concerned about his safety. This finding was not against the manifest weight of the evidence.

{¶25} In the twenty-seventh finding of fact, the trial court concluded that prison officials acted reasonably after appellant informed them of a conversation concerning a possible takeover in July 1997, and that the prison was not required to maintain extra security in DR-4 indefinitely. Again, appellant maintains that he continued to inform prison officials that a riot was impending after July 1997. However, as stated previously, the trial court concluded that appellant's kites had been altered, that his testimony was not credible, and that the testimony of the prison officials with whom he had spoken and addressed correspondence was more credible. As such, this finding of fact is not against the manifest weight of the evidence.

{¶26} In the twenty-eighth finding of fact, the trial court concluded that appellant had not proven that prison officials had actual or constructive notice of an impending assault upon him. Appellant again contends that prison officials had actual notice of the impending assault; however, as stated previously, the trial court found that appellant's testimony was not credible and that he had altered the kites, which he alleged he had sent to prison officials. Prison officials did increase security after appellant notified them that he had overheard conversations concerning a possible riot. When no riot occurred and when prison officials did not receive any additional information concerning a riot, those extra

lieutenants were pulled out of DR-4. It was seven weeks later that this riot occurred and appellant was injured.

{¶27} The state is not liable for an intentional attack on an inmate by another inmate unless there is adequate notice of an impending assault. See *Williams v. Southern Correctional Facility* (1990), 67 Ohio App.3d 517. The trial court found that appellant failed to prove by a preponderance of the evidence that prison officials had adequate notice of the impending assault on him. As stated previously, prison officials testified that appellant did not request protective custody but that he continued to object to the RIB finding that he had assaulted a prison officer. A review of the kites, which were in the custody of prison officials, reflects only appellant's request to be removed from DR-4 because he felt that he had been wrongfully convicted of assaulting an officer when he felt that he had been the one who was assaulted. The trial court's finding was not against the manifest weight of the evidence.

{¶28} Appellant also contends that the trial court's ninth conclusion of law is against the manifest weight of the evidence. The trial court concluded that appellant failed to prove by a preponderance of the evidence that he had received inadequate medical treatment after the riot. Appellant's jaw was broken when he was assaulted during the riot. Dr. Durrell Trago testified on appellant's behalf. According to Dr. Trago's testimony, appellant's surgery was within the standards of reasonable medical care. Dr. Trago did testify that the braces, which were placed on appellant's lower jaw, should have been removed sooner than they had been. However, Dr. Trago also testified that the delay in removing the braces did not harm appellant.

Dr. Trago also testified that appellant's ribs had healed satisfactorily.

{¶29} Dr. Michael Hauser testified as an expert in oral and maxillofacial surgery. Dr. Hauser agreed with Dr. Trago that appellant's surgery was appropriate and within the standards of reasonable medical care. Dr. Hauser testified that appellant has had no detrimental affect by having the braces in his mouth longer than clinically required.

{¶30} Appellant had claimed that he had lost weight as a result of the braces remaining in his mouth. However, two days following the riot appellant weighed 147 pounds. On February 19, 1998, appellant weighted 165 pounds.

{¶31} Based upon the evidence, the trial court did not err in concluding that appellant had failed to prove by a preponderance of the evidence that he had received inadequate medical treatment after the riot.

{¶32} Based on the foregoing, appellant's first, second, and fifth assignments of error are not well-taken and are overruled.

{¶33} In his third assignment of error, appellant contends the trial court erred in sustaining objections to certain questions his counsel asked of Priscilla Rowe as those questions were directly relevant to Rowe's credibility.

{¶34} At trial and in his brief before this court, appellant continues to maintain and argue that the kites he submitted as evidence had not been altered. Based upon those kites, appellant contends that prison officials had more than adequate knowledge of an impending riot and knew that appellant feared for his life. In challenging

Inspector Rowe and her testimony, appellant contends that someone else whited out the language addressing the possibility of a riot and his fear for his life from the kites that Ms. Rowe received.

{¶35} The first question asked of Ms. Rowe inferred that Ms. Rowe did indeed know that a riot was being planned because she had been told so by Officer Traxler. An objection was raised to this question on the basis that the question called for hearsay and the trial court agreed. Appellant was instructed to call Officer Traxler on cross-examination to find out whether or not she had told Ms. Rowe about the riot. Clearly the question did call for hearsay and the trial court correctly sustained the objection.

{¶36} Appellant's counsel then attempted to pose a hypothetical question to Ms. Rowe concerning why appellant would have told everyone else in the prison that he was in danger and not tell her when she was the only person who could have helped him. Contrary to appellant's assertions, even if the question was directed to Ms. Rowe's credibility, it called for the witness to speculate. This court finds that the trial court did not abuse its discretion by limiting appellant's questions in these regards. As such, appellant's third assignment of error is not well-taken and is overruled.

{¶37} In his fourth assignment of error, appellant contends that the trial court erred in sustaining objections to questions asked of inmate Garner. Counsel for appellant questioned inmate Garner concerning how he was escorted from one cell to another. Appellant was attempting to show that the policy utilized by the officers when moving inmates was improper. The trial court sustained the

objections to the questions, as those questions were not directed to issues involved in appellant's case. It appears that appellant was attempting to show that ODRC and officials at ManCI were negligent in many areas concerning occurrences at the prison. Based upon this general negligence, it appears that appellant was attempting to show that prison officials were specifically negligent when it came to how they handled security before the riot and how they regained control of the prison after the riot. However, the trial court concluded that inmate Garner could only testify about those maters which had an impact on occurrences before the riot, during the riot, and specifically what he knew about matters involving appellant. Upon review, this court finds the trial court did not abuse its discretion by limiting inmate Garner's testimony to those subjects that were directly relevant to appellant's lawsuit. As such, appellant's fourth assignment of error is not well-taken and is overruled.

{¶38} In his sixth and final assignment of error, appellant contends that the trial court erred in failing to allow him to include as evidence his deposition which had been taken on September 28, 2000. For the reasons that follow, this court finds the trial court did not abuse its discretion.

{¶39} The trial in the present case was held on January 23 and 24, 2001. It was not until February 14, 2001 that appellant moved to enlarge the record to include his deposition testimony. Appellant's stated reasons for the request were that Dr. Hauser's deposition of January 9, 2001 was based, in part, upon his review of appellant's deposition.

{¶40} Civ.R. 32(A) provides that every deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing, unless for good cause the court permits a later filing. Upon review of appellant's motion to enlarge the record, appellant offered no explanation providing good cause and the trial court did not abuse its discretion in refusing to allow him to file his deposition testimony following the trial. As such, this assignment of error is likewise not well-taken and is overruled.

{¶41} Based on the foregoing, appellant's six assignments of error are overruled, and the judgment of the Ohio Court of Claims is hereby affirmed.

Judgment affirmed.

BOWMAN and BRYANT, JJ., concur.

GLASSER, J., retired of the Sixth Appellate District, assigned by active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph D. Murphy, Plaintiff-Appellant, v. Department of Rehabilitation and Correction, Defendant-Appellee.	:	No. 02AP-132 (REGULAR CALENDAR) (Filed Oct. 8, 2002)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on September 30, 2002, appellant's six assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Ohio Court of Claims is affirmed. Costs are assessed against appellant.

GLASSER, BOWMAN & BRYANT, JJ.

By /s/ George M. Glasser
Judge George M. Glasser

GLASSER, J., retired of the Sixth Appellate District, assigned by active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX C

– COC DECISION

IN THE COURT OF CLAIMS OF OHIO

JOSEPH D. MURPHY, Plaintiff	CASE NO. 99-12073
v.	DECISION
DEPARTMENT OF REHABILITATION AND CORRECTION, Defendant	Judge Fred J. Shoemaker (Filed Dec. 27, 2001)

This matter was tried to the court on the sole issue of liability. The parties filed post-trial briefs.

Plaintiff was a death row inmate at Mansfield Correctional Institution (ManCI). Plaintiff filed his complaint, alleging that defendant Department of Rehabilitation and Correction (DRC) was negligent in allowing the September 5, 1997, riot in death row pod #4 (DR-4) to take place. Of the five death row units, DR-4 housed the most dangerous inmates. The riot began after death row inmate Keith Lamar overpowered and assaulted Corrections Officer (CO) George Hayes and stole Hayes' keys. Lamar and inmate Tony Powell then freed other death row inmates in DR-4. The COs were able to escape. However, after Lamar and Powell used the keys to release other inmates, they and the inmates whom they had released assaulted other inmates including plaintiff. This was a major riot that lasted for several hours, causing injuries to inmates and substantial property damage to the institution. In addition, there were substantial personnel and other costs.

A major cause of the rioting was the decision by inmate Wilford Berry to volunteer to be executed rather than to appeal his death sentence. Berry had always been locked in his cell for his own protection. He was savagely beaten by the rioting inmates. The rioters also attacked inmates who they believed to be "snitches." (A "snitch" is an inmate who delivers information to the staff regarding activities of other inmates.)

Plaintiff also alleges that he received inadequate medical treatment from the staff at ManCI after the riot.

The court, after evaluating the credibility of all the witnesses and reviewing all of the admitted exhibits, makes the following judgment based upon the preponderance of the evidence and the law.

FINDINGS OF FACT

1) On June 25, 1997, plaintiff was a convicted killer housed on death row at the ManCI. On that date, he received two conduct reports. One report was for refusing to "lock up," the other was for assaulting an officer with handcuffs. (Defendant's Exhibit K.);

2) At that time, the death row unit at ManCI consisted of five death row general population pods, *i.e.*, DR-1 through DR-5. DR-4 consisted of an A-side, which housed general population death row inmates, and a B-side, which was the disciplinary segregation unit for death row. The B-side of DR-4 housed inmates who were on security control, local control, and administrative control status. The b-side inmates received fewer privileges than inmates on the A-side;

3) Murphy was assigned to the B-side of DR-4 pending a hearing before the Rules Infraction Board (RIB) for the two conduct reports. He was subsequently found guilty on both reports and was sentenced to local control on the B-side in DR-4;

4) Murphy, orally and in writing, stated his displeasure with the RIB convictions because he believed that the officer had assaulted *him*. (Defendant's Exhibits F, G and K.);

5) In the summer of 1997, the entire death row unit was single-celled. Tension in DR-4 was high due to hunger strikes, lack of privileges, TB health tests, and the fact that death row inmate Wilford Berry had attempted to waive his right to pursue his death penalty appeal. Therefore, deputy wardens and other high-ranking institutional officials were in DR-4 on a daily basis;

6) On July 11, 1997, Murphy overheard certain death row inmates discussing a takeover of DR-4;

7) Rumors of a possible takeover or riot often surfaced ManCI. For example, Officer Betty Traxler had heard grumblings of a possible takeover for three to four months prior to the summer of 1997;

8) On July 14, 1997, Murphy informed Officer Traxler that he had overheard inmates discussing a takeover. During the conversation he never asked that he be moved from the B-side of DR-4 nor did he indicate that he feared for his life;

9) Officer Traxler conveyed the information to the appropriate parties and security was increased in DR-4. Two lieutenants were assigned to DR-4 during the first

and second shifts, when inmates would have reason to be out of their cells;

10) The lieutenants reviewed security procedures and observed the inmate environment in DR-4 for approximately two weeks. During that time, Murphy was not interviewed because he would have been in substantial danger if other inmates observed him talking with investigators and he would be considered a "snitch";

11) While the lieutenants were in DR-4, the institution did not receive any additional or new information that a takeover was still being planned. Therefore, the lieutenants were pulled out of DR-4 at the end of July 1997 and staffing levels were returned to normal. That action would not have been taken if there was reason to believe there was going to be a takeover;

12) Between the end of July 1997, up to September 5, 1997, the institution did not receive any additional or new information from Murphy or any other inmate that a riot was being planned;

13) Although there were written communications from Murphy in August of 1997, allegedly warning of the riot, the evidence shows they were forged and/or altered by Murphy. The true purpose of those communications was Murphy's allegation that he did not deserve the two conduct reports he received in June of 1997. (Defendant's Exhibits F, G, K; Plaintiff's Exhibits 9, 22, 23, 31.) The evidence was absolutely clear that plaintiff gave perjured testimony regarding these exhibits;

14) Investigator Joseph Masi did not receive any information via letter or telephone from Shirley Pope,

Principal Research Assistant for the Correctional Institution Inspection Committee, prior to the riot;

15) Prior to the riot, the institution was not aware that inmates Keith Lamar and Tony Powell planned to take over DR-4 or that Murphy was in any personal danger;

16) On September 3, 1997, Institutional Inspector Priscilla Rowe spoke with Murphy in a private RIB room within DR-4. They discussed his recent written communication to her regarding the conduct reports he received for assaulting an officer on June 25, 1997. Murphy appeared relaxed, pleasant, calm, and not in fear for his life. He did not say anything to her about a takeover. (Defendant's Exhibit K.);

17) On September 5, 1997, Murphy was still in local control on B-side in DR-4;

18) On September 5, 1997, the riot occurred in DR-4 after inmate Keith Lamar overpowered a CO in a recreation area and used the officer's keys to release inmate Tony Powell from another recreational cage. Together, inmates Lamar and Powell assaulted the officers on duty and obtained the officers' keys before the officers were able to escape DR-4;

19) Inmates Lamar and Powell used the officers' keys to release other inmates in DR-4 from their cells. Lamar, Powell and other inmates then assaulted several others, including Murphy. Their prime target was inmate Wilford Berry ("the volunteer"); however, any inmate suspected of being a "snitch" as also assaulted;

20) On September 5, 1997, no separation orders existed between Murphy and inmates Lamar or Powell;

21) Although the riot was confined within DR-4, the interior of DR-4 could not be seen. The DR-4 inmates had painted the windows with primer and placed sheets over shattered glass to obstruct any view;

22) In accordance with critical incident protocol, the institution developed a tactical plan to retake DR-4. Given the thirty-seven unsecured death row inmates in DR-4, at least thirty members of the Special Response Team (SRT), trained to respond to prison disturbances, were needed to enter DR-4. The plan also called for distraction devices, such as "flash bangs," to be fired into DR-4 as well as disbursement of tear gas through the ventilation system;

23) Prior to the SRT entering DR-4, the lights were shut off. The plan called for the SRT to physically enter DR-4 with appropriate weapons and to use necessary force, including deadly force, to restore order and gain control;

24) Tear gas was dispensed into DR-4 at approximately 10:00 p.m. The SRT entered the outer door to DR-4, not knowing what awaited them. (Defendant's exhibits M, N, O, P, and Q.) However, the inner door to DR-4 had been secured by the inmates with chains, handcuffs, and leg irons;

25) Bolt cutters were used to open the inner door to DR-4. (Defendant's Exhibits M, N, O, P, and Q.) The SRT extracted every DR-4 inmate. All areas were covered, including cells, fire escapes, recreation cages, and the RIB room. Each inmate was handcuffed per security policies and escorted to a nearby triage area for medical assessment. No excessive force was used on any inmate;

26) After the riot, the DR-4 inmates that had previously been housed on the B-side remained housed together in a different unit. All of these inmates were still under security, local, and administrative control status. Murphy remained under local control status until several months after the riot due to his being found guilty of the conduct reports he received on June 25, 1997. Later, the guilty findings were reversed by the warden on procedural grounds. (Plaintiff's Exhibit 11.);

27) Defendant acted reasonably after plaintiff told them that certain inmates would attempt to take control of DR-4. Defendant should not be required to maintain extra security on DR-4 indefinitely;

28) Plaintiff did not prove that defendant had actual or constructive notice of an impending assault upon him.

CONCLUSIONS OF LAW

1) In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285;

2) The court has the responsibility to judge the credibility of every witness;

3) Prisons are inherently dangerous and prison officials owe a duty of reasonable care to inmates but are not insurers of their safety. *Clemets v. Heston* (1985), 20 Ohio App.3d 231; *Williams v. Southern Ohio Correctional Facility* (1990), 67 Ohio App.3d 517;

4) Defendant's withdrawal of extra lieutenants in DR-4 was a decision involving a high degree of official judgment and discretion and the state is not liable for such a decision. *Reynolds v. State* (1984), 14 Ohio St. 3d 68 at 70:

5) An assault upon plaintiff by Lamar and Powell was not a reasonably foreseeable result of CO Hayes' negligence under the circumstances of this case. *Evans v. Mansfield Corr. Inst.* (Jan. 19, 2001), Court of Claims No. 98-06801, unreported;

6) Defendant had insufficient notice of an impending attack upon plaintiff and is not liable for the injuries sustained by plaintiff as a result of the attack. *Millette v. Ohio Dept. of Rehab. & Corr.* (1996), 83 Ohio Misc.2d 44;

7) Defendant's actions in quelling the riot were reasonable under all the circumstances;

8) Defendant is also entitled to discretionary immunity regarding the housing of inmates;

9) Plaintiff failed to prove by a preponderance of the evidence that he received inadequate medical treatment after the riot.

* * *

Judgment shall be rendered in favor of defendant.

/s/ Fred J. Shoemaker
FRED J. SHOEMAKER
Judge

APPENDIX D

The Supreme Court of Ohio

Joseph D. Murphy,	:	
Appellant,	:	Case No. 02-2014
v.	:	ENTRY
Department of Rehabilitation and Correction,	:	(Filed Mar. 12, 2003)
Appellee.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by John F. Heath, Esq.

(Franklin County Court of Appeals; No. 02AP132)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX E

The Supreme Court of Ohio

Joseph D. Murphy,	:	
Appellant,	:	Case No. 02-2014
v.	:	RECONSIDERATION ENTRY
Department of Rehabilitation and Correction,	:	(Franklin County)
Appellee.	:	(Filed May 7, 2003)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 02AP132)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice